

STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

In Re:

APPLICATION OF CINGULAR WIRELESS PSC, LLC FOR A
CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND
PUBLIC NEED FOR THE CONSTRUCTION, MAINTENANCE,
AND OPERATION OF A TELECOMMUNICATIONS FACILITY
AT 8 BARNES ROAD, FALLS VILLAGE, CONNECTICUT

DOCKET: 409

June 14, 2011

**TOWN OF CANAAN INLAND WETLANDS/CONSERVATION COMMISSION
RESPONSE AND OPPOSITION TO NEW CINGULAR WIRELESS, PCS, LLC
("AT&T")'S OBJECTIONS TO ADMISSION BY THE SITING COUNCIL OF CERTAIN
EXHIBITS OF THE FALLS VILLAGE INLAND WETLANDS/CONSERVATION
COMMISSION**

On June 8, 2011 the Applicant New Cingular Wireless, PCS, LLC pre-filed its Objection to Admission by the Siting Council of Certain Exhibits of the Falls Village Inland Wetland/Conservation Commission. The Falls Village Inland Wetlands/Conservation Commission ("IW/CC") respectfully responds and opposes the Applicant's Objections.

Town of Canaan (Falls Village) Inland Wetlands/Conservation Commission Mandate

The Town of Canaan Inland Wetlands Commission is charged by law to consider

(1) The environmental impact of the proposed activity on wetlands or watercourses;

(2) The applicant's purpose for, and any feasible and prudent alternatives to, the proposed regulated activity which alternatives would cause less or no environmental impact to wetlands or watercourses;

(3) The relationship between the short-term and long-term impacts of the proposed regulated activity on wetlands or watercourses and the maintenance and enhancement of long-term productivity of such wetlands or watercourses;

(4) Irreversible and irretrievable loss of wetland or watercourse resources which would be caused by the proposed regulated activity, including the extent to which such activity would foreclose a future ability to protect, enhance or restore such resources, and any mitigation measures which may be considered as a condition of issuing a permit for such activity including, but not limited to, measures to (A) prevent or minimize pollution or other environmental damage, (B) maintain or enhance existing environmental quality,

or (C) in the following order of priority: Restore, enhance and create productive wetland or watercourse resources;

(5) The character and degree of injury to, or interference with, safety, health or the reasonable use of property which is caused or threatened by the proposed regulated activity; and (6) Impacts of the proposed regulated activity on wetlands or watercourses outside the area for which the activity is proposed and future activities associated with, or reasonably related to, the proposed regulated activity which are made inevitable by the proposed regulated activity and which may have an impact on wetlands or watercourses.

(C.G.S. §22a-41) (Emphasis added.)

Among other things, the Commission is required to protect and prevent harm to

* * * (1) “wetlands or watercourses” include[ing] aquatic, plant or animal life and habitats in wetlands or watercourses, and
(2) “habitats” means areas or environments in which an organism or biological population normally lives or occurs.

(C.G.S. §22a-41(c)(1)) (Emphasis added.)

As we have previously stated, we are required by law to regulate "activities affecting the wetlands and watercourses within the territorial limits of [the Town of Canaan/Falls Village]."

(C.G.S. §22a-42(a)) (Emphasis added.)

This is the express policy and law of the State of Connecticut, bound by funding and contract to the enforcement of the Federal Clean Water Act. By local law, the IW/CC is the designated enforcement mechanism in the Town of Canaan.

This mandate extends to endangered species and their habitats, but the IW/CC's mandates are comprehensive in that we must consider cause and effect. (C.G.S. §22a-41; C.G.S. §22a-42)

IA. The IW/CC's Proffered Exhibits Are Relevant and Material

Each of the exhibits proffered by the IW/CC is relevant and material to the IW/CC statutory duties and responsibilities in protecting the wetlands from harm. To the extent that the New Cingular Wireless tower proposal constitutes a threat to the natural resources under the

IW/CC's care and jurisdiction, the IW/CC has a duty to call it to the Council's attention and not to permit such threats of injury and harm to "[i]rreversible and irretrievable loss of wetland or watercourse resources which would be caused by the proposed regulated activity" (C.G.S. §22a-41 (4)) among others. (See also C.G.S. §22a-41 and 22a-41, *supra*)

In addition, the Council's mandate, under UAPA Section 4-178 is that:

* * * (3) when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form; (4) documentary evidence may be received in the form of copies or excerpts, if the original is not readily available, and upon request, parties and the agency conducting the proceeding shall be given an opportunity to compare the copy with the original; (5) a party and such agency may conduct cross-examinations required for a full and true disclosure of the facts; (6) notice may be taken of judicially cognizable facts and of generally recognized technical or scientific facts within the agency's specialized knowledge; * * *

(Emphasis added.)

The statute provides no mandatory cross-examination. The language referring to cross exam is permissive, not mandatory.

Additionally, UAPA Section 4-177c provides:

Sec. 4-177c. Contested cases. Documents. Evidence. Arguments. Statements. (a) In a contested case, each party and the agency conducting the proceeding shall be afforded the opportunity to (1) to inspect and copy relevant and material records, papers and documents not in the possession of the party or such agency, except as otherwise provided by federal law or any other provision of the general statutes, and (2) at a hearing, to respond, to cross-examine other parties, intervenors, and witnesses, and to present evidence and argument on all issues involved.

(b) Persons not named as parties or intervenors may, in the discretion of the presiding officer, be given an opportunity to present oral or written statements. The presiding officer may require any such statement to be given under oath or affirmation.

(Emphasis added.)

Therefore, it is in the discretion of the presiding officer, and not a mandate nor a statutory right that the Applicant be entitled to any exclusion of written statements, nor that cross-

examination is available to the Applicant of any others than of “other parties, intervenors and witnesses.” (*Ibid.*)

The Applicant’s citing of the term “limited appearance” is also misplaced. Under C.G.S. §16-50n(f):

(f) Any person may make a limited appearance at a hearing held pursuant to the provisions of section 16-50m, prior thereto or within thirty days thereafter, entitling such person to file a statement in writing. At the discretion of the council any person may make a limited appearance at any such hearing to present an oral statement under oath. All papers and matters filed by a person making a limited appearance shall become part of the record. No person making a limited appearance, and not otherwise entitled to be a party, shall be a party or shall have the right to cross-examine witnesses, parties or intervenors.

(Emphasis added.)

Therefore, the applicable statute is §4-177c – the IW/CC has included “written statements” by persons who are not parties to this proceeding. They are therefore not subject to cross examination, nor are their written statements excludable, except at the discretion of the presiding officer under §177c (b), and only the presiding officer may require that such persons be subject to oath or affirmation of their statements under rules of administrative procedure and due process. If the Chairman should request or require the authors of these statements to take an oath, our Commission will produce such persons who have not previously offered to answer questions. However, it is to be noted here that most of these people already appeared at the public session of the hearing on February 17, 2011 (transcript, 2/17/11) and made themselves available for questioning. On these people’s written statements, then, the IW/CC vigorously objects to these late and misplaced demands for cross-examination.

IB. Applicant’s Objection As To Exhibits Being “Unduly Repetitious” Defies The Discharge of the IW/CC’s Duties and If Granted Would Effect Prejudice

The Applicant's objection that certain of the exhibits are "unduly repetitious" is a complaint without substance since these exhibits are deemed significant in the discharge of the IW/CC's wetlands protection responsibilities.

No prejudice has been asserted where repetition may exist, whereas excluding such exhibits would prejudice the IW/CC's responsibilities, in violation of UAPA Section 4-178.

II. CSC Lacks Jurisdiction to Exclude Exhibits Submitted By The Official Agency Charged With Wetlands Protection

The CSC has a statutory responsibility to determine the "environmental compatibility" of the tower proposal, which includes any threats to the natural wetland resources and the wildlife they support.

C.G.S. §16-50p, the statute describing the factors considered by the Siting Council in determining whether a "certificate of environmental compatibility and public need" may be granted, expressly provide:

(B) The nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities, including a specification of every adverse effect, including, but not limited to, electromagnetic fields that, whether alone or cumulatively with other effects on, and conflict with the policies of the state concerning the natural environment, ecological balance, public health and safety, scenic, historic and recreational values, forests and parks, air and water purity and fish, aquaculture and wildlife;

(C) Why the adverse effects or conflicts referred to in subparagraph (B) of this subdivision are not sufficient reason to deny the application;

(C.G.S. §16-50p(3)(B) and (C))

The language of this statute is mandatory language: C.G.S. §16-50p(2) states: "The Council's decision shall be rendered in accordance with the following:" (Emphasis added.)

Sec. 16-50p. Certification proceeding decisions: Timing, opinion, factors considered. Telecommunications and community antenna television facilities: Additional factors considered, conditions. Modification of location. Amendment proceeding decisions. Service and notice. "Public need" defined. (a) * * * (2) The council's decision shall be rendered in accordance with the following: * * *

(b) (1) Prior to granting an applicant's certificate for a facility described in subdivision (5) or (6) of section 16-50i, the council shall examine, in addition to its consideration of subdivisions (1) to (5), inclusive, of subsection (a) of this section: (A) The feasibility of requiring an applicant to share an existing facility, as defined in subsection (b) of section 16-50aa, within a technically derived search area of the site of the proposed facility, provided such shared use is technically, legally, environmentally and economically feasible and meets public safety concerns, (B) whether such facility, if constructed, may be shared with any public or private entity which provides telecommunications or community antenna television service to the public, provided such shared use is technically, legally, environmentally and economically feasible at fair market rates, meets public safety concerns, and the parties' interests have been considered and (C) whether the proposed facility would be located in an area of the state which the council, in consultation with the Department of Environmental Protection and any affected municipalities, finds to be a relatively undisturbed area that possesses scenic quality of local, regional or state-wide significance. The council may deny an application for a certificate if it determines that (i) shared use under the provisions of subparagraph (A) of this subdivision is feasible, (ii) the applicant would not cooperate relative to the future shared use of the proposed facility, or (iii) the proposed facility would substantially affect the scenic quality of its location and no public safety concerns require that the proposed facility be constructed in such a location.

(C.G.S. §16-50p) (Emphasis added.)

The Siting Council is bound by law to defer to a local agency's own regulations. C.G.S.

Section 16-50t(b) provides:

(b) The council may adopt regulations or standards in accordance with the provisions of chapter 54, with respect to subdivisions (1) and (2) of subsection (a) of this section. Such regulations or standards shall be in addition to and not in lieu of any regulation or standard adopted by any other state or local agency or instrumentality. * * *

(Emphasis added.)

Accordingly the CSC must consider the IW/CC's designated exhibits both as a matter of comity to an official agency with direct jurisdiction over wetlands protection, and in discharge of the CSC's own statutory responsibility to determine "environmental compatibility."

The Applicant's arguments that certain of these exhibits are irrelevant and immaterial is in disregard of the issue of wetland protection.

III. No Preemption Exists to IW/CC Consideration of "The character and degree of injury to, or interference with, safety, health or the reasonable use of property which is caused or threatened by the proposed regulated activity"

Among the IW/CC's several explicit obligations is the express consideration of health and safety:

(5) The character and degree of injury to, or interference with, safety, health or the reasonable use of property which is caused or threatened by the proposed regulated activity;

(C.G.S. §22a-41(5))

The Applicant's claim of FCC preemption over consideration of health-related evidence is not applicable to, nor binding upon the IW/CC. The TCA did not repeal the Clean Water Act under whose mandates the Commission operates. All such evidence is relevant and material to the IW/CC's deliberations, decisions and recommendations.

IV. Public Comments are Relevant, Material and Mandated to be Considered Under State Law and May Not Be Excluded Here

The Siting Council is directed by statute to hold public hearings and to solicit public comment and information bearing on the tower placement and issues related thereto. Frequently such comments contain valuable information for the Council's consideration, and particularly from residents who know the site well over many years.

Of particular significance is the sworn affidavit of Bonnie Burdick which demonstrates the factual misstatements of the Applicant's visibility assessment consultant concerning the visibility of the tower from Johnson Road.

The Federal Courts have themselves given weight to public comments in reviewing the decisions of state agencies.

CONCLUSION

The Applicant's objections to the admission of the IW/CC's exhibits must be rejected. The CSC has no jurisdiction to limit or control the evidence taken into consideration by the IW/CC in protecting the wetlands under its particular care and supervision.

The Siting Council must respect the authority of the Wetlands Commission on issues in which wetlands are directly involved and affected.

Respectfully submitted,

_____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on this day, a copy of the foregoing was sent electronically to the Connecticut Siting Council through Christina Walsh, and also to the following. Hard copies will be hand delivered on each of these parties and the Siting Council at the continued hearing on Thursday June 16, 2011:

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/s/
Ellery W. Sinclair

Dated: June 14, 2011